VOTER RESIDENCY REQUIREMENTS IN STATE AND LOCAL ELECTIONS

In 1970, Ohio's voter residency laws withstood two constitutional challenges in the federal district courts.[1] In *Sirak v. Brown*,[2] the petitioner moved to Columbus in January of 1970 and attempted to register as a voter in Franklin County on May 19, 1970, so that she could vote in the fall election on November 3. Her application was denied on the basis of her not having resided in Ohio for one year. Thereafter, a complaint was filed in the Federal District Court for the Southern District of Ohio attacking the residency requirement. The complaint was later dismissed on the ground that no substantial federal question was raised, thereby precluding the convening of a three judge court. This judgment was appealed, but since argument was not set until after the election, counsel moved the Supreme Court for a stay and temporary injunction of the district court ruling, which was denied.[3] After the election had passed, petitioner moved for and was granted a remand to the district court with order to vacate judgment and to enter judgment as moot. In *Howe v. Brown*,[4] the petitioner and his wife had not resided in Ohio for a year before attempting to register to vote with the Cuyahoga County Board of Elections. After denial of registration, a complaint was entered in the Federal District Court for the Northern District of Ohio which convened a three judge court to hear the merits of the constitutional challenge. The court, one judge dissenting, upheld the validity of the one year durational requirement. However, several other three judge courts confronting the same issue on similar facts and law have reached contrary conclusions. The rationale of the conflicting viewpoints is analyzed in this Note. After discussion of the traditional concept of voter residency qualifications, attention is focused upon the rationale that appears to be a trend undermining the state's power to restrict voting rights. Thereafter, the extent to which voter residency laws infringe upon the right to travel is examined.

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[1] OHIO CONST. art. V, § 1 (1923):

> Every citizen of the United States, of the age of twenty-one years, who shall have been a resident of the state one year next preceding the election, and of the county, township, or ward, in which he resides, such time as may be provided by law, shall have the qualifications of an elector, and be entitled to vote at all elections.

Ohio voters on November 3, 1970 amended the above provision so that the existing residency requirement is six months rather than one year.

OHIO REV. CODE § 3503.01 (Page 1953), in pertinent part provides:

> Every citizen of the United States who is of the age of twenty-one years or over and who have been a resident of the state one year, of the county forty days, and of the voting precinct forty days next preceding the election at which he offers to vote has the qualifications of an elector and may vote at all elections. . . .

[2] Civil No. 70-164 (S.D. Ohio, July 10, 1970), *motion to vacate and cause remanded to dismiss as moot granted*, No. 20,753 (6th Cir., Dec. 10, 1970).

[3] 400 U.S. 809 (1970).

[4] 319 F. Supp. 862 (N.D. Ohio 1970).

I. DURATIONAL RESIDENCY REQUIREMENT VIEWED AS A STATE'S RIGHT

A traditional approach to examine state voter residency qualifications initially focuses on *Pope v. Williams*.[5] In this case the petitioner changed his residence from Washington, D.C., to Maryland where the state constitution and election statutes required new residents to register their intent to reside in Maryland one year prior to becoming qualified electors.[6] Although the petitioner had resided in Maryland over a year before attempting to register to vote in state elections, he was denied registration for failure to register his intentions.[7] The statute was then challenged on three grounds: 1) the privilege and immunities clause, 2) the equal protection clause, and 3) the right to interstate movement. In upholding the Maryland statute the Court said:

> The privilege to vote in any State is not given by the Federal Constitution, or by any of its amendments. It is not a privilege springing from citizenship of the United States. *Minor v. Happersett, 21 Wall. 162.* It may not be refused on account of race, color or previous condition of servitude, but it does not follow from mere citizenship of the United States. In other words, the privilege to vote in a State is within the jurisdiction of the State itself, to be exercised as the State may direct, and upon such terms as to it may seem proper, provided, of course, no discrimination is made between individuals in violation of the Federal Constitution.[8]

In addition, the Court stated that there was no federal question involved in determining the reasonableness of residency conditions:

> The question whether the conditions prescribed by the State might be regarded by others as reasonable or unreasonable is not a Federal one. We do not wish to be understood, however, as intimating that the condition in this statute is unreasonable or in any way improper.[9]

The right to vote in state elections was not an unqualified privilege or immunity of the United States, but rather was a privilege granted from the reserved powers of the several states. Therefore, if state voter residency laws fail, there would appear to be a modification in state and federal powers.

Later case decisions cite the reasoning of *Pope* with approval and affirm the proposition that states are within their power to impose condi-

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[5] 193 U.S. 621 (1904).

[6] MD. CODE art. 33, § 25B (1902).

[7] This case has been widely stated as upholding the one year durational residency requirement of Maryland, however, that issue was not before the court. The only issue to be decided was whether Maryland had the legal right to require a new resident to *declare his intent of residency* a year before should have the right to be registered as a voter. *See* 193 U.S. at 632.

[8] 193 U.S. 621, 632 (1904).

[9] *Id.* at 633.

tions on citizens before they qualify as electors. In *Lassiter v. Northampton Election Bd.*[10] the Court said:

> The States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised, *Pope v. Williams*, 193 U.S. 621, 633; *Mason v. Missouri*, 179 U.S. 328, 335, absent of course the discrimination which the Constitution condemns. . . . . We do not suggest any standards which a State desires to adopt may be required of voters. But there is wide scope for exercise of its jurisdiction. Residence requirements, age, previous criminal record are obvious examples indicating factors which a State may take into consideration in determining the qualifications of voters.[11]

Similarly, in *Carrington v. Rash*[12] the Court stated:

> Texas has unquestioned power to impose reasonable residence restrictions on the availability of the ballot. *Pope v. Williams*, 193 U.S. 621. There can be no doubt either of the historic function of the States to establish, on a nondiscriminatory basis, and in accordance with the Constitution, other qualifications for the exercise of the franchise.[13]

However, the most significant support of the traditional point of view is *Dreuding v. Devlin*,[14] in which a three judge district court upheld Maryland's requirement of one year residency within the state and six months residency within the county before one could qualify to vote for presidential and vice presidential electors.[15] This decision is significant for two reasons. First, the court does not strictly adhere to the *Pope* rationale which said the reasonableness of the state qualification was not a federal question, but rather the three judge court asked whether the residency requirements were so unreasonable as to amount to a prohibited discrimination. To test the reasonableness under the equal protection clause, the court applied the common test as stated in *McGowan v. Maryland*:[16]

> Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.[17]

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[10] 360 U.S. 45 (1959).

[11] *Id.* at 50-51 (citation omitted).

[12] 380 U.S. 89 (1965).

[13] *Id.* at 91.

[14] 234 F. Supp. 721 (D. Md. 1964), *aff'd per curiam*, 380 U.S. 125 (1965).

[15] 234 F. Supp. at 722 n.1.

[16] 366 U.S. 420 (1961).

[17] *Id.* at 425-26 (citations and footnote omitted).

Also significant is the fact that the court rejected the petitioner's argument that this voter qualification issue is analogous to the reapportionment and redistricting cases of *Wesberry v. Sanders*[18] and *Reynolds v. Sims*[19] in which the Supreme Court spoke of suffrage as a fundamental right and subjected suffrage impediments to the Fourteenth Amendment.[20] The *Dreuding* court made no attempt to distinguish these cases when rejecting this reasoning. Apparently, the court felt that a state voter qualification such as residency was to be tested by a different standard than lines drawn by legislators dividing the population. The silence of the court might also suggest that the court was protecting a right of the state, and that these cases raised too stringent a standard for residency laws to be upheld.

The district courts of Ohio followed the traditional point of view on residency qualifications as stated in *Pope* and *Dreuding*. In *Howe v. Brown*[21] the court recognized the existence of two standards to measure state legislative action: 1) the rational relation test, and 2) the compelling state interest test. The court noted that the latter test had been used by the Supreme Court in *Shapiro v. Thompson*,[22] *McLaughlin v. Florida*,[23] and *Korematsu v. United States*[24] which all concerned infringement of a constitutional right. The test looks to see if the classification is necessary to promote an articulated state interest, and whether the articulated interest is compelling for the state. However, the court rejected this equal protection standard by returning to the state's right view of *Pope* in order to conclude that there is no constitutional right to vote in a state election and that the "rational" standard had been applied to such conditions as age, literacy,[25] criminal record,[26] United States citizenship, and residency.[27] The basis for applying this test has been that the states did not surrender to the federal government the power to determine who is qualified to vote in state and local elections. The court concluded:

> Since no one has the federal constitutional right to vote in State and local elections, the state may create reasonable nondiscriminatory classifications of those to whom it will grant the franchise. Since reasonable conditions of suffrage do not impinge upon a federal constitutional right to vote in

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[18] 376 U.S. 1 (1964).

[19] 377 U.S. 533 (1964).

[20] *See* text accompanying notes 52-55 *infra.*

[21] 319 F. Supp. 862 (N.D. Ohio 1970).

[22] 394 U.S. 618, 634 (1969).

[23] 379 U.S. 184, 192 (1964).

[24] 323 U.S. 214, 216 (1944).

[25] *See, e.g.*, Lassiter v. Northhampton County Board of Elections, 360 U.S. 45 (1959); *but see* Oregon v. Mitchell, 400 U.S. 112 (1970) (upholding Title II of the Voting Rights Act Amendments of 1970 prohibiting the use of any test or device resembling a literacy test in any national, state, or local election that discriminates on a basis of race).

[26] *See* Davis v. Beason, 133 U.S. 333 (1890).

[27] *See* Pope v. Williams, 193 U.S. 621 (1904); Dreuding v. Devlin, 234 F. Supp. 721 (D. Md. 1964), *aff'd per curiam*, 380 U.S. 125 (1965).

> state and local elections, the "rational relation" test has consistently been applied.[28]

The court found that Ohio had several interests that are promoted by the one year residency requirement: 1) ensuring that those who vote for state and local representatives are familiar with the political candidates and issues by having been given maximum exposure to the problems of the locality through the media of local communication, 2) preventing individuals, motivated only by a desire to affect the state's election results, from "moving" into the state shortly before the election was held, voting, and then returning to their foreign domicile; 3) ensuring that the electors have genuine interests in the community.[29]

The rationale of *Dreuding* was also accepted by classifying voting rights cases so that the compelling state interest test would only apply to particular voting restrictions. The court said:

> Until the Supreme Court sees the need to apply the "compelling state interest" test in all voting rights cases, or applies it across the board in equal protection cases, it is not within this Court's province to declare every inequality, every inconvenience, every burden a state places upon one class of citizens and not on another and every distinction created by legislatures violative of the Equal Protection Clause.[30]

In *Sirak v. Brown*,[31] the court was persuaded by the same arguments and refused to convene a three judge court. In the memorandum supporting the motion to dismiss the complaint, counsel for defendants contended that no substantial federal question was presented since *Pope v. Williams*[32] had not been overruled, and, in fact, has been cited with approval in *Dreuding v. Devlin*,[33] *Carrington v. Rash*,[34] and *Hall v. Beals*.[35] The district court felt "bound by the rule of law established in *Pope*" which was the underlying basis of *Dreuding*.[36] The court concluded:

> Thus the United States Supreme Court has consistently held that State voter residency requirements are constitutional. In light of these decisions, the Court holds that plaintiff's motion to convene a Three Judge Court is without merit, and therefore it is DENIED. *Cf., Sola v. Sanchez Vilella*,

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[28] 319 F. Supp. 862, 865 (N.D. Ohio 1970).

[29] *Id.* at 866.

[30] *Id.* at 869.

[31] Civil No. 70-164 (S.D. Ohio, July 10, 1970), *motion to vacate and cause remanded to dismiss as moot granted*, No. 20,753 (6th Cir. Dec. 10, 1970).

[32] 193 U.S. 621 (1904).

[33] 234 F. Supp. 721 (D. Md. 1964), *aff'd per curiam*, 380 U.S. 125 (1965).

[34] 380 U.S. 89 (1965).

[35] 292 F. Supp. 610 (D. Colo. 1968), *appeal dismissed as moot*, 396 U.S. 45 (1969) (challenge to the Colorado six month residency requirement).

[36] Civil No. 70-164, 2 (N.D. Ohio, July 10, 1970).

270 F. Supp. 459, 464 (D. Puerto Rico 1967), *aff'd.* 390 F.2d 160 (1st Cir. 1968).[37]

It is interesting to note that this was the only district court in 1970 that refused to grant a three judge court to listen to the merits of a challenge to residency qualifications. It is difficult to determine how the court concluded that the issue was so conclusively resolved in light of the fact that prior three judge courts had been convened to hear similar issues[38] and that recent Supreme Court decisions suggested a new approach to examine voting right restrictions.[39] Furthermore, at the time of this decision two other districts had convened three judge courts to listen to the merits of the issue.[40]

The validity of state residency qualifications has also been sustained in other federal districts. In *Cocanower v. Marston*,[41] the petitioner attacked the one year residency law of Arizona on several grounds, one of which was the equal protection clause. The argument was based on the use of the compelling state interest test which was rejected by the court since the Supreme Court had only applied that test to "special purpose election cases."[42] The court found assurance in *Pope* and *Dreuding* to apply the rational purpose test to the state interests of 1) identification of the voter and protection against fraud, and 2) insurance that the voter is a part of the community and has a legitimate interest in its government.

Illinois also endured an attack on a one year state and ninety day county residency requirement in *Fitzpatrick v. Board of Election Commissioners*.[43] The Supreme Court cases applying the compelling state interest test were distinguished on the basis that in those cases qualified citizens were withdrawn from the electorate because of the way they would vote. Although the court took notice of an "impressive line of authority," the reasonableness test was used on the basis of the *Pope* opinion.[44] However, several other district courts have adopted a new rationale on which voter residency requirements have been held to be unconstitutional.[45]

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[37] *Id.*

[38] In *Dreuding v. Devlin* and *Hall v. Beals* three judge courts were convened to hear the challenge on residency laws pertaining to federal elections.

[39] *See* text accompanying notes 50-59 *infra.*

[40] *See* Burg v. Canniffee, 315 F. Supp. 380 (D. Mass. 1970), *appeal docketed*, 39 U.S.L.W. 3168 (U.S. Oct. 6, 1970) (No. 811) (one year residency requirement); Blumstein v. Ellington, 39 U.S.L.W. 3229 (M.D. Tenn. 1970), *jurisdiction noted*, 39 U.S.L.W. 3375 (U.S. Mar. 1, 1971) (No. 769) (one year residency requirement).

[41] 318 F. Supp. 402 (D. Ariz. 1970).

[42] *Id.* at 404.

[43] 39 U.S.L.W. 2356 (N.D. Ill. 1970), *appeal docketed*, 39 U.S.L.W. 3362 (U.S. Feb. 12, 1971) (No. 1344).

[44] *Id.*

[45] *See* Lester v. Bd. Educ. for Dist. Col. 319 F. Supp. 505 (D.D.C. 1970); Hadnott v. Amos, 320 F. Supp. 107 (M.D. Ala. 1970), *appeal docketed*, 39 U.S.L.W. 3282 (U.S. Dec. 21, 1970) (No. 1139) (six month county and three month precinct residency requirements); Affeldt v. Whitcomb, 319 F. Supp. 69 (N.D. Ind. 1970), *appeal docketed*, 39 U.S.L.W. 3273 (U.S. Dec.

II. UNDERMINING OF THE STATE'S RIGHT VIEWPOINT

There is no doubt that the challenger of a voter qualification law such as residency has an uphill battle to wage since *Pope v. Williams*[46] and *Dreuding v. Devlin*[47] have not been explicitly overruled. However, the voting rights cases and equal protection cases of the last decade have provided a new rationale which tends to implicitly overrule the rationale of *Pope* and *Dreuding*. First, the right to vote in national as well as state elections appears to be elevated to a level comparable to first amendment freedoms. Also, the Supreme Court has been more willing to scrutinize state restrictions under the fourteenth amendment. Finally, since *Shapiro v. Thompson*,[48] durational residency laws are becoming suspect in protecting state interests.[49]

The voting rights cases during the last decade stress the importance and sanctity of the right to vote. Such a notion is founded on the basis that suffrage preserves our other liberties. This is not a novel idea within the suffrage realm since it was first expressed by Justice Matthews in *Yick Wo v. Hopkins*,[50] when he stated that "[political suffrage] is regarded as a fundamental political right, because preservative of all rights."[51] This concept has been adopted and expanded in many of the landmark voting decisions in the 1960's. In *Reynolds v. Sims*[52] Chief Justice Warren said:

> Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.[53]

Justice Black had expressed a similar view in *Wesberry v. Sanders*,[54] when he praised the right of suffrage:

> No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens,

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10, 1970) (No. 1081) (six month residency requirement); Bufford v. Holton, 319 F. Supp. 843 (E. D. Va. 1970); Burg v. Canniffe, 315 F. Supp. 380 (D. Mass. 1970), *appeal docketed*, 39 U.S.L.W. 3168 (U.S. Oct. 6, 1970) (No. 811) (one year residency requirement); Blumstein v. Ellington, 39 U.S.L.W. 3229 (M.D. Tenn. 1970), *jurisdiction noted*, 39 U.S.L.W. 3375 (U.S. Mar. 1, 1971) (No. 769) (one year residency requirement); Kohn v. Davis, 320 F. Supp. 246 (D. Vt. 1970); *appeal docketed*, 39 U.S.L.W. 3347 (U.S. Feb. 10, 1971) (No. 1336) (one year residency requirement).

[46] 193 U.S. 621 (1904).

[47] 234 F. Supp. 721 (D. Md. 1964), *aff'd per curium*, 380 U.S. 125 (1965).

[48] 394 U.S. 618 (1969).

[49] *See, e.g.*, Webster v. Wofford, 39 U.S.L.W. 2382 (N.D. Ga. 1970) (one year residency requirement for admission to the bar invalid using compelling state interest test).

[50] 118 U.S. 356 (1886).

[51] *Id.* at 370.

[52] 377 U.S. 533 (1964).

[53] *Id.* at 561-2.

[54] 376 U.S. 1, (1964).

> we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.[55]

In conjunction with these exalations of suffrage, it is apparent that the Supreme Court has been eager to protect this right evidenced by the list of decisions voiding state restrictions that failed to achieve an equality of votes cast in state and federal elections.[56]

However, the *Dreuding* court dismissed *Reynolds* and *Wesberry* as inapplicable to the facts of that case apparently because they were not concerned with voter qualifications, but rather were directed at redistricting and reapportionment respectively. But, the new approach taken by the Supreme Court seems to indicate that there is no classification of the character of the restriction. There has developed a blanket right to vote, and any restrictions or debasement of the right are subject to the same standard. The Supreme Court appears to have dropped the classification of voting cases in *Carrington v. Rash*[57] when subjecting a Texas voter qualification statute to the equal protection clause. This was the first case to do so, as noted by Justice Harlan in his dissent:

> Anyone not familiar with the provisions of the Fourteenth Amendment, the history of that Amendment, and the decisions of the Court in this constitutional area, would gather from today's opinion that it is an established constitutional tenet that state laws governing the qualifications of voters are subject to the limitations of the Equal Protection Clause. Yet any dispassionate survey of the past will reveal that the present decision is the first to so hold.[58]

Therefore, it is very arguable that the voting rights cases of the last decade, whether concerned with residency restrictions or not, influence and implicitly undermine the rationale of the *Pope* and *Dreuding* decisions.[59]

Since it is apparent that the right to vote has become more precious under our system of government, it is logical that the standard for protection of that right also has become more stringent. In explaining the ap-

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[55] *Id.* at 17.

[56] *See* Carrington v. Rash, 380 U.S. 89 (1965) (Texas law precluding members of the Armed Forces residing in Texas from voting in state elections); Kraemer v. Union Free School Dist., 395 U.S. 621 (1969) (law restricting the right to vote in certain school board elections to owners and lessees of real property and parents); Cipriano v. City of Houma, 395 U.S. 701 (1969) (state law restricting to property taxpayers the vote in elections to approve issuance of revenue bonds); Evans v. Cornman, 398 U.S. 419 (1970) (application of state law denying the vote to those living on a federal reservation within the state); City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970) (state law restricting to real property taxpayers the vote in elections to approve issuance of general obligation bonds).

[57] 380 U.S. 89 (1965).

[58] *Id.* at 97. However, since *Dreuding* was affirmed by the Supreme Court, it would only be logical to assume it was the first case that subjected voter qualifications to the fourteenth amendment.

[59] *See* note 56 *supra.*

plication of the equal protection clause to the realm of voting cases, Justice Douglas stated in *Harper v. Virginia Board of Elections*:[60]

> Likewise, the Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights. (citations omitted). Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change.[61]

As discussed above, the common equal protection standard has been the rational relation test, however, the Supreme Court has also used a compelling interest test.[62] This is a more stringent standard which has been applied to classifications which infringe on a citizen's constitutional rights. One of the first applications of this standard was in *Korematsu v. United States*,[63] when a federal legislative classification was based on race, and more recently in *McLaughlin v. Florida*,[64] where a racial classification was embodied in a state criminal statute.

Although the Supreme Court opinions are not clear on this issue, it does appear that a compelling interest test has been applied to voting cases. In *Harper v. Virginia Board of Elections*,[65] the Supreme Court reaffirmed the language of *Reynolds v. Sims*[66] that "any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."[67] In *Harper*, the Court struck down a state voting law requiring a poll tax to be paid before qualifying as an elector. In *Kraemer v. Union School District No. 15*,[68] the Supreme Court explicitly applied the compelling interest standard when it voided a New York law restricting the right to vote in school district elections to property owners or lease holders of taxable property or those who have children in school:

> [I]f a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest. *See Carrington v. Rash, supra*, at 96.[69]

This rationale has also been expressed by Justice Marshall in his dissent

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[60] 383 U.S. 663 (1966).

[61] *Id.* at 669.

[62] *See* text accompanying notes 21-24 *supra.*

[63] 323 U.S. 214, 216 (1944).

[64] 379 U.S. 184, 192 (1964). For other cases using the compelling interest test, *see* Skinner v. Oklahoma, 316 U.S. 535 (1942); Bates v. Little Rock, 361 U.S. 516 (1960); Sherbert v. Verner, 374 U.S. 398 (1963); NAACP v. Alabama, 357 U.S. 449 (1958).

[65] 383 U.S. 663 (1966).

[66] 377 U.S. 533 (1964).

[67] 383 U.S. at 667, *citing* 337 U.S. at 561-2.

[68] 395 U.S. 621 (1969).

[69] *Id.* at 627. *See also* Cipriano v. City of Houma, 395 U.S. 701, 704 (1969).

in *Hall v. Beals*.[70] The majority of the Court refused to reach the merits of the challenge to the six month residency requirement under a Colorado statute pertaining to presidential and vice presidential elections, since Colorado had in the interim between the decision and appeal reduced its qualification to two months. Marshall felt that the Court should not have vacated judgment and dismissed the case as most moot since the issue was one likely to reoccur. Furthermore, he felt that such action would be misleading to the lower courts since "*Dreuding* is not good law today."[71] In support of this contention he stated:

> But if it was not clear in 1965 it is clear now that once a State has determined that a decision is to be made by popular vote, it may exclude persons from the franchise only upon a showing of a compelling interest, and even then only when the exclusion is the least restrictive method of achieving a desired purpose.[72]

If this evidence is not sufficiently convincing, the compelling state interest test was used to strike down selective distribution of the franchise in two cases during 1970: *Evans v. Cornman*[73] and *City of Phoenix v. Kolodziejski*.[74] Therefore, under the new rationale the stricter standard of compelling interest must be applied to state classifications that infringe upon the right to vote.

There can be no doubt that *Shapiro v. Thompson*[75] had a catalytic effect on the challenging of residency requirements in several cases including voting. In that case, the Supreme Court invalidated Connecticut's, Pennsylvania's, and Washington, D. C.'s statutes which required a person to reside in the state for one year before welfare could be received. The Court determined that such a requirement penalized and restricted a citizen from exercising his right to move interstate, and applied the compelling interest test to the interests advanced by Louisiana for maintaining the requirement, but found to the contrary that none of the interests promoted were compelling. The Court attempted to limit the scope of the opinion by using a footnote which said the court expressed no view as to residency requirements determining eligibility to vote, eligibility for tuition-free education, to obtain a license to practice a profession,[76] or to hunt and fish; but Chief Justice Warren, dissenting, could not "understand the Court's implication . . . that other state residency requirements such as those employed in determining eligibility to vote do not present constitutional questions."[77]

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[70] 396 U.S. 45 (1969).

[71] *Id.* at 52.

[72] *Id.* (citations omitted).

[73] 398 U.S. 419 (1970) (right to vote denied to residents of federal enclaves).

[74] 399 U.S. 204 (1970) (right to vote in bond issue denied to nonowners of real property).

[75] 394 U.S. 618 (1969).

[76] *See* note 49 *supra*.

[77] 394 U.S. 618, 654 (1969).

Therefore, with this major attack on the state's interests underlying residency requirements, there could be no doubt that residency requirements restricting suffrage would become suspect.

As stated before, the two Ohio decisions followed the traditional or state's right approach to state residency laws; however, the recent Supreme Court approach was also discussed. Counsel for Mrs. Sirak argued, in brief, the reasoning of these cases, and one judge dissented on a similar rationale in *Howe*. Furthermore, the majority of that court undertook to distinguish the recent Supreme Court decisions.

The argument presented in *Sirak* was similar to Justice Marshall's dissent in *Hall v. Beals*.[78] Counsel contended that the recent Supreme Court decisions of *Kraemer* and *Shapiro* undermined the rational relation test and supplanted a compelling state interest test. Similar to the *Evans v. Cornan*[79] situation, where Maryland maintained political control over the residents of federal enclaves but denied them the right to vote, Ohio also denied the right to vote to a class of citizens subject to Ohio's laws. This was claimed to be a "fencing out" process which was said to exist in *Carrington v. Rash*[80] and therefore invalid.

After concluding that the compelling state interest test was to be applied to residency requirements, since they infringe upon the fundamental right to vote, counsel examined the state interests in light of the standard. One possible interest of the state was to protect itself from fraudulent declarations of citizenship. However, counsel noted the rejection of this contention by Justice Marshall since it created a conclusive presumption of nonresidency. Citing *Shapiro*, counsel noted that the real issues to be determined are whether a person is a resident and whether he intends to remain a resident, not how long a person has resided in the state. A flat durational requirement is overly broad and it would be possible to achieve the interest by a narrower restriction. Administrative simplicity was also examined as a state interest, but on the basis of *Carrington* this interest has been rejected. Furthermore, forty days has been determined as administratively feasible to handle registration of voters before a presidential election. Counsel also used the fact of the proposed constitutional amendment to reduce the residency requirement to six months as evidence that Ohio had no interest whatsoever in a one year duration. A third state interest might be the state's concern of new residents' familiarity of local issues, however, counsel phrased the interest as to "how the recent citizen may vote."[81] In *Carrington* the Supreme Court rejected the contention that how servicemen might vote was a valid basis for voting restrictions.

The *Howe* court believed that there has been no change in the state-

[78] 396 U.S. 45 (1969).

[79] 398 U.S. 419 (1970).

[80] 380 U.S. 89 (1965).

[81] Brief for Petitioner at 7, Sirak v. Brown, Civil No. 70-164 (S.D. Ohio, July 10, 1970).

federal relationship even after the series of voting cases beginning with *Kraemer*, and that the contrary opinions in other district courts, *Blumstein v. Ellington*[82] and *Burg v. Canniffee*,[83] were in error. This court read the recent Supreme Court decisions in a different light:

> *Kraemer* and its progeny stand for the following proposition: Persons who *qualify* under a state's valid election laws (by meeting its conditions of suffrage, *i.e.*, age, residency, and citizenship requirements) have a *constitutional right* to vote in *all* state and local elections in which they have an interest. No state legislation or constitution may *impinge* upon this constitutional right to vote *once qualified* by "selectively excluding" a class of otherwise qualified electors from voting in any election in which they have an interest, unless the "compelling state interest" test is satisfied; that is, the classification of otherwise qualified voters excluded must be "necessary" to promote a "compelling state interest."[84]

Therefore, the court reasoned that the compelling state interest test was applied in situations not present on the facts, such as "fencing out" citizens who are otherwise qualified to vote because of the manner in which they might vote. No intention had been made or shown that people who live in Ohio less than a year tend to vote in the same manner. Also, the court classified the types of voting cases and noted that the compelling state interest test had not been applied across the board to all voting cases. One judge dissented on a theory similar to Justice Marshall's dissent in *Hall*.

During the last half of 1970, the voter residency laws of seven states were held unconstitutional by three judge district courts.[85] Contrary to the Ohio opinions, these courts adopted the reasoning of Justice Marshall in his dissenting opinion in *Hall*. The reasoning of these opinions is very similar. They express the view that the Constitution protects the right to vote, and this right is fundamental. After this conclusion, it was only necessary to determine the standard, whether rational or compelling, to measure the condition on suffrage. After an examination of the Supreme Court decisions of the 1960's, the overall trend indicated that the compelling state interest test had replaced the rational relation test. Upon applying this test, the courts determined that the states had no compelling interest to protect by using residency laws. However, this issue has not been conclusively resolved.

States generally contend that there is need for a durational residency requirement in order to afford protection from fraudulent voting and dual voting. There is no doubt that the requirement is rationally related to the end of having a pure electorate, but there is no compelling interest. In

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[82] 39 U.S.L.W. 3229 (M.D. Tenn., 1970), *jurisdiction noted*, 39 U.S.L.W. 3375 (U.S. Mar. 1, 1971) (No. 769).

[83] 315 F. Supp. 380 (D. Mass. 1970), *appeal docketed*, 39 U.S.L.W. 3168 (U.S. Oct. 6, 1970) (No. 811).

[84] 319 F. Supp. 862, 866 (N.D. Ohio 1970).

[85] *See* note 45 *supra*.

many states residency is established by oath, therefore, the durational requirement affords no protection from the liar. Furthermore, the state can uphold its interest by a less restrictive qualification such as registration which could require a declaration of intent to remain in the state. Ohio's anti-fraud statutes could deter false declaration of intent by subjecting the violators to a fine from $50-$1000 or one to three years in prison.[86] Another interest contended by the states is administrative simplicity. Although there may be a rational relationship to this contention, the state's own actions dispell any interest in long durations. For example, Ohio required only a forty day registration closing period for presidential elections,[87] and this requirement has been further reduced by congressional action.[88] Furthermore, *Carrington v. Rash*[89] indicated that administrative simplicity cannot be a basis for voting restrictions. The states also indicate that there is need for a durational requirement so that new residents will have time to gain knowledge of local issues. This contention has been rejected on the national scale on the basis of modern day communications; however, this reasoning does not apply to state and local elections. Therefore, the state may very well have a compelling interest in promoting an intelligent use of the ballot by imposing residency requirements.[90] However, it must be remembered that the restriction must be narrowly drawn so that a state can promote its interest in intelligent use of the ballot in a less restrictive manner than a blanket denial of the franchise to all new residents.

Although the new rationale, based on the importance of the right to vote and expansion of the meaning of the equal protection clause, is very persuasive, the Supreme Court could easily reject the approach. The *Pope* decision provided the states with broad discretion when qualifying electors. The foundation of this state's right, although narrowed in the last decade, has not been obliterated. However, the Supreme Court has also indicated inconsistent positions on the residency issue. This occurred when stays of the district court's judgments were requested of the Supreme Court in both *Sirak v. Brown*[91] and *Burg v. Canniffee*.[92] Both stays were denied even though *Sirak* was decided in favor of the state and *Burg* was decided against the state's position. However, the most recent voting rights opinion, *Oregon v. Mitchell*,[93] provides insight as to how the Justices might re-

[86] OHIO REV. CODE ANN. § 3599.11 (Page 1960).

[87] *Id.* § 3505.01.

[88] *See* Voting Rights Act of 1970, Pub. L. No. 91-285, § 201-305, 84 Stat. 314 (June 22, 1970).

[89] 380 U.S. 89 (1965).

[90] *See* Lassiter v. Northampton Election Bd., 360 U.S. 45, 51-2 (1959); *cf.* Oregon v. Mitchell, 400 U.S. 112, 242 (1970) (Brennen, J., dissenting and concurring).

[91] *See* note 31 *supra.*

[92] *See* note 83 *supra.*

[93] 400 U.S. 112 (1970) (Holding that Congress could fix the age of electors in federal elec-

act when the state residency issue comes before the Supreme Court. There are four Justices that would void state voter residency requirements. Justices Brennan and Marshall had previously indicated their position in dissent in *Hall v. Beals*.[94] In *Mitchell*, they were joined by Justice White. In their dissent on the issue of congressional authority to fix the age of voters in state elections, they indicated that although the states have wide discretion in establishing voter qualifications, any restriction must undergo a compelling state interest test.[95] Although Justice Douglas does not explicitly state that the compelling interest test is the governing standard, he indicates that voting is a civil right. Furthermore, his discussion of recent voting decisions indicates that the equal protection clause is broad enough to protect any infringement on this right.[96] The remaining five justices would hold that the state-federal relationship has not changed in the area of voter qualifications so that reasonable durational requirements are within the state's authority. Justice Black would uphold the state's power on the authority of *Pope*:

> No function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution the qualifications of their own voters for state, county, and municipal offices and the nature of their own machinery for filling local public offices. *Pope v. Williams*, 193 U.S. 621 (1904); *Minor v. Happersett*, 21 Wall. 162 (1874).[97]

Justice Harlan elaborately discussed the history of the fourteenth amendment in *Mitchell*. His position indicates that the rights of the states can only be changed by constitutional amendment, therefore, he would not apply the equal protection clause to state residency requirements. The Chief Justice and Justices Blackmun and Stewart indicated in a footnote that questions raised by state voter residency laws are "quite different from those attending the constitutionality of § 202."[98] However, if one equates the power of the state to establish age qualifications with residency qualifications, these Justices would not interfere with the power of the states to make reasonable choices:

> To be sure, recent decisions have established that state action regulating suffrage is not immune from the impact of the Equal Protection Clause. But we have been careful in those decisions to note the undoubted power

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tions but not in state and local elections, that Congress could exercise their power under the fourteenth and fifteenth amendments in or to prohibit the use of literacy tests or other devices used to discriminate against voters on account of their race in both state and local elections, and that Congress could set residency requirements and provide for absentee balloting in elections for presidential and vice presidential electors).

[94] 396 U.S. 45, 51 (1969).

[95] 400 U.S. 112, 242 (1970).

[96] *Id.* at 140.

[97] *Id.* at 125.

[98] *Id.* at 292 n.9.

> of a State to establish a qualification for voting based on age. *See, e.g., Kramer v. Union School District*, 395 U.S. 621, 625; *Lassiter v. Northampton Election Board*, 360 U.S. 45, 51. Indeed, none of the opinions filed today suggest that the States have anything but a constitutionally unimpeachable interest in establishing some age qualification as such. Yet to test the power to establish an age qualification by the "compelling interest" standard is really to deny a State any choice at all, because no State could demonstrate a "compelling interest" in drawing the line with respect to age at one point rather than another. Obviously, the power to establish an age qualification must carry with it the power to choose 21 as a reasonable voting age, as the vast majority of the States have done.[99]

Therefore, the compelling interest test would not be adopted by a 5-4 vote. However, the right to travel also is a ground upon which to void state voter residency laws.

III. VOTER RESIDENCY LAWS AND THE RIGHT TO TRAVEL INTERSTATE

In *Hall v. Beals*,[100] Justice Marshall upon reaching the merits argued that the residency requirement of Colorado was invalid, and that *Dreuding* was no longer good law. His conclusion was based entirely on a voting rights analysis, that is, that the residency requirement infringed upon the fundamental right to vote, and therefore, the compelling state interest test of the equal protection clause was applicable. However, since the *Shapiro v. Thompson*[101] decision, which voided a one year welfare residency requirement on the basis of an infringement of the fundamental right to travel interstate, there have also been questions whether the residency laws of voter registration infringe upon this right to travel and must undergo the compelling interest test.

As previously mentioned, the Court in *Shapiro* at footnote twenty-one made it clear that the conclusion did not invalidate voter residency requirements:

> We imply no view of the validity of waiting-period *or* residence requirements determining eligibility to vote. . . . Such requirements may promote compelling state interests on the one hand, or, on the other, may not be penalties upon the exercise of the constitutional right of interstate travel.[102]

It can be argued therefore, that *Shapiro* has no relevance to residency requirements related to state elections, since the Court was concerned only

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[99] *Id.* at 294-95 (footnotes omitted).

[100] 396 U.S. 45 (1969).

[101] 394 U.S. 618 (1969).

[102] *Id.* at 638. *See also*, Green v. Department of Public Welfare of State of Delaware, 270 F. Supp. 173,178 (D. Del. 1967). There, the court rejected the state's argument that the reasoning of Dreuding upholding a years voter residency law would also be applied to Delaware's welfare durational requirement.

with welfare payments. However, this language does not reject the possibility of applying the rationale to later voting cases, because voter residency requirements *may not* promote compelling state interests and *may very well be* penalties upon the right to travel. Therefore, the reasoning of the decision is important to determine its applicability to voting cases.

The Court in *Shapiro* found that the welfare benefits of the states had been denied to eligible applicants solely because they had recently moved into the state. This was found to be a penalty on travel.

> But in moving from State to State or to the District of Columbia appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional.[103]

From this reasoning it might be concluded that state interests in voter residency laws must also undergo the compelling interest test if it can be shown that the laws inhibit interstate movement. Of course, proving such a deterence would be a difficult task. However, it would also be difficult for a court to say that the inability to vote is of no concern to an individual, particularly if the right to vote is considered a fundamental right under the Constitution. It has also been suggested that penalty need not connote a deterence, but rather, if the nature of the deprivation determines whether a penalty on the right to travel exists, then a residency voting requirement would constitute a penalty.[104] Furthermore, since a challenge to a voter residency law would contain an infringement on two fundamental rights, voting and travel, the reasoning of *Aptheker v. Secretary of State*[105] might be applied. In that case the petitioner as a potential traveler was compelled to choose between his right to travel and his first amendment freedoms. As Chief Justice Warren said in explaining his decision in his dissent in *Shapiro*: "[i]t was this Hobson's choice, we later explained, which forms the rationale of *Aptheker*."[106]

Congressional hearings for the Voting Rights Act of 1970[107] also support the contention that residency restrictions burden the right of interstate travel. Although these findings are worded for federal elections, it is difficult to rationalize how such a restriction is a burden in one instance but not another.

The courts that have upheld state residency laws have consistently stated that these laws do not impinge on the right to travel. In *Howe v. Brown*,[108] the court read *Shapiro* in the same manner as it had read the

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[103] *Id.* at 634 (citations omitted).

[104] Note, *Residence Requirements for Voting in Presidential Elections*, 37 U. CHI. L. REV. 359, 382 (1970).

[105] 378 U.S. 500 (1964).

[106] 394 U.S. 618, 649 (1969).

[107] *See* note 88 *supra.*

[108] 319 F. Supp. 862 (N.D. Ohio 1970).

voting cases, that is, the residency requirement must have the effect of "fencing out" anyone from the state of Ohio. Since no allegation or proof was offered on the issue, the court could find no infringement. *Cocanower v. Marston*[109] took a different approach to *Shapiro*.

> [I]n the context of a constitutional right to travel the Court [in *Shapiro*] recognized a distinction between state-imposed residency requirements as a condition to receiving welfare benefits and those durational residency requirements imposed as a qualification to vote.[110]

Since *Sirak v. Brown*[111] did not reach the merits, it might be inferred that the court did not feel *Shapiro* was relevant to the facts.

Of the several decisions that have voided residency requirements for voting in state elections, it is interesting to note that only two of them, *Kohn v. Davis*[112] and *Bufford v. Holton*,[113] have relied on the additional ground of right to travel. In *Kohn*, the court viewed the one year residency requirement of Vermont as a limitation on both the right to travel and right to vote. In *Bufford*, the court did not think Virginia proved any compelling interest in the one year residency requirement:

> On the contrary the difference in treatment of residents, regardless of the State's intendment, is clearly an arbitrary discrimination. To begin with, this call for residence can without more be seen as an obstruction or deterrent to uninhibited interstate travel, admittedly a Constitutional prerogative. Shapiro v. Thompson, *supra*, at 629, 89 S.Ct. 1322. A person might well be unduly postponed in the enjoyment of his vote for an extortionate period, possibly as much as two years (short of a day) if he came into Virginia after November in a general election year. The newcomer may have lost his vote by departure from the former habitat and be unable to regain it with reasonable promptness in Virginia.[114]

Although the interstate movement issue was before some of the other district courts, the decisions rested only on the equal protection argument of this right to vote. Although this issue would be raised before the Supreme Court in light of voting rights, it is doubtful that the Justices who favor the state's right position would invalidate voting residency on a right to travel basis.

IV. CONCLUSION

The Ohio federal district courts upheld Ohio's one year durational residency requirement for state and local elections. These courts viewed the Constitution as giving broad powers to the state to determine the qualifi-

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[109] 318 F. Supp. 402 (D. Ariz. 1970).

[110] *Id.* at 408 (footnote omitted).

[111] *See* note 31 *supra*.

[112] 320 F. Supp. 246 (D. Vt. 1970).

[113] 319 F. Supp. 843 (E.D. Va. 1970).

[114] *Id.* at 846.

cations for electors. In other words, the reasoning of *Pope* and *Dreuding* was read with approval. However, the last decade of Supreme Court decisions indicate that the right to vote is now fundamental to our society since it is preservative of all our rights. Furthermore, there appears to be a trend not only to continue to subject voting cases to the equal protection clause, but also to protect suffrage by use of a compelling state interest test rather than the traditional rational relation standard. However, an examination of the recent *Arizona* decision indicates that such reasoning might not apply to this area of state's rights. Finally, residency requirements have been held unconstitutional in welfare cases if the requirement infringes on the right to travel. Although this reasoning can be applied to voting cases, it would be difficult to identify any penalty on travel imposed by these residency laws. Therefore, it is doubtful state voter residency statutes would be voided on this ground.

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